

**IN THE SUPREME COURT OF MISSOURI**

SCHWARZ PHARMA, INC., n/k/a	)	
UCB, INC.,	)	
	)	
Relator,	)	
	)	<b>Case No. SC 93516</b>
v.	)	
	)	<b>Missouri Court of Appeals,</b>
THE HONORABLE DAVID L.	)	<b>Eastern District No. ED99877</b>
DOWD, JUDGE, CIRCUIT COURT OF	)	
ST. LOUIS CITY, MISSOURI	)	<b>Circuit Court of St. Louis City</b>
	)	<b>Cause No. 1222-CC10178 (Bryan)</b>
Respondent.	)	

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**BRIEF OF RELATOR**  
**SCHWARZ PHARMA, INC., n/k/a UCB, INC.**

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**ORAL ARGUMENT REQUESTED**

## Table of Contents

Table of Authorities .....	iii	
Jurisdictional Statement .....	1	
Statement of Facts .....	2	
Points Relied On .....	8	
Argument.....	11	
Relator is Entitled to a Permanent Order Prohibiting		
Respondent from Enforcing his Order Denying Relator’s		
Motion to Transfer, Because that Order Exceeded Respondent’s		
Jurisdiction and Authority, in that Under Rule 51.045(a)		
Relator had, at Minimum, Sixty Days from the First Date of		
Service of any Pleading in this Matter to Move to Transfer and		
Relator Moved to Transfer this Case Well within that Period. ....		11
Relator is Entitled to a Permanent Order Prohibiting		
Respondent from Enforcing his Order Denying Relator’s		
Motion to Transfer, Because that Order Exceeded Respondent’s		
Jurisdiction and Authority, in that Under Rule 51.045(a)		
Relator had Sixty Days from the Date of Service of Plaintiff		
Bryan’s Individual Petition to Move to Transfer and Relator		
Moved to Transfer this Case Well within that Period. ....		17

Relator is Entitled to a Permanent Order Prohibiting Respondent from Enforcing his Order Denying Relator’s Motion to Transfer, Because that Order Exceeded Respondent’s Jurisdiction and Authority, in that Under Section 508.010.5(1), R.S.Mo., Venue in this Tort Action is Proper Only in St. Louis County, Where Defendants’ Registered Agents are Located, Given that Plaintiff’s First Injuries were Likely Sustained in Pennsylvania, and Plaintiff is not a Missouri Resident. ....	21
Conclusion .....	27
Certification .....	29
Certificate of Service .....	30

## TABLE OF AUTHORITIES

	Page(s)
<b><u>Missouri Statutes and Rules</u></b>	
Missouri Constitution, Article V § 4.1 .....	1
Missouri Rule of Civil Procedure 51.045 .....	<i>passim</i>
Missouri Rule of Civil Procedure 52.05 .....	2
Missouri Rule of Civil Procedure 52.06 .....	2
RSMo § 347.069 .....	3, 9, 21, 24
RSMo § 508.010 .....	3, 5, 8, 9, 20, 21, 23, 24
RSMo § 508.010.10 .....	5
<b><u>Related Pleadings</u></b>	
<u>Jannett Anderson, et al., v. Wyeth LLC, et al.</u> , No. 1222-CC00910 (Twenty- Second Jud. Cir. Ct., Feb. 22, 2012) .....	<i>passim</i>
<u>Fuller v. Wyeth LLC, et al.</u> , 1222 CC-10195 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3
<u>Harker v. Wyeth LLC, et al.</u> , 1222-CC10204 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3
<u>Howell v. Wyeth LLC, et al.</u> , 1222-CC10177, (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3
<u>Krischke v. Wyeth LLC, et al.</u> , 1222-CC10168 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3

<u>Mifsud v. Wyeth LLC, et al.</u> , 1222-CC10190 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3
<u>Pullen v. Wyeth LLC, et al.</u> , 1222-CC10229 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3
<u>Quayyum v. Wyeth LLC, et al.</u> , 1222-CC10226 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	3, 4
<u>Simmons v. Wyeth LLC, et al.</u> , 1222-CC10223 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	4
<u>Stewart v. Wyeth LLC, et al.</u> , 1222-CC10215 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	4
<u>Wilcox v. Wyeth LLC, et al.</u> , 1222-CC10205 (Twenty-Second Jud. Cir. Ct., Oct. 3, 2012).....	4

## **Cases**

<u>Howard v. City of Kansas City</u> , 332 S.W.3d 772 (Mo. banc 2011).....	14
<u>State ex rel. Selimanovic v. Dierker</u> , 246 S.W.3d 931 (Mo. banc 2008) .....	9, 23
<u>State ex rel. Green v. Neill</u> , 127 S.W.3d 677 (Mo. banc 2004).....	8, 11, 17, 22
<u>State ex rel. Kinder v. McShane</u> , 87 S.W.3d 256 (Mo. banc 2002) .....	11, 17, 22
<u>State ex rel. Vee-Jay Contracting Co. v. Neill</u> , 89 S.W.3d 470 (Mo. 2002) .....	13
<u>State ex rel. Linthicum v. Calvin</u> , 57 S.W.3d 855 (Mo. banc 2001) .....	11, 17, 22
<u>Norden v. Friedman</u> , 756 S.W.2d 158 (Mo. banc 1988) .....	15
<u>Sullinger v. Cooke Sales &amp; Service Co.</u> , 646 S.W.2d 85 (Mo. banc 1983) .....	7, 12

<u>State ex rel. Carver v. Whipple</u> , 608 S.W.2d 410 (Mo. banc 1980).....	7, 14
<u>State ex rel. Bowden v. Jensen</u> , 359 S.W.2d 343 (Mo. banc 1962) .....	7, 13
<u>Robinson v. Field</u> , 342 Mo. 778, 117 S.W.2d 308 (1938).....	15
<u>Ex parte Haley</u> , 99 Mo. 150, 12 S.W. 667 (1889) .....	7, 25
<u>State ex rel. Etter, Inc. v. Neill</u> , 70 S.W.3d 28 (Mo. App. E.D. 2002).....	11, 17, 22
<u>State ex rel. KCP &amp; L Greater Mo. Operations Co. v. Cook</u> ,	
353 S.W.3d 14 (Mo. App. W.D. 2011) .....	11, 17, 21
<u>Jones v. Church</u> , 252 S.W.2d 647 (Mo. App. 1952).....	14
<u>Dube v. Wyeth LLC, et al.</u> ,	
4:12-cv-1912-ERW, 2013 WL 607834 (E.D. Mo. Feb. 19, 2013) .....	19
<u>Pa. Emps. Benefit Trust Fund v. AstraZeneca Pharms., L.P.</u> ,	
No. 08-cv-04787, 2008 WL 4891387 (E.D. Pa. Nov. 13, 2008) .....	18

### **Jurisdictional Statement**

Upon application of Schwarz Pharma, Inc., n/k/a UCB, Inc. (“Schwarz”), this Court issued a Preliminary Writ of Prohibition on August 13, 2013. This Court has jurisdiction to hear this Writ pursuant to Article V § 4.1 of the Missouri Constitution. Relator Schwarz seeks a Permanent Order of Prohibition to prevent the Honorable David L. Dowd from enforcing his order of April 5, 2013 (**A1 – A5**), denying Relator’s Motion to Transfer for Improper Venue. The record before Respondent demonstrated that 1) the Motion to Transfer was timely filed, 2) Plaintiff cannot satisfy Missouri’s requirements for establishing venue in St. Louis City Circuit Court, and 3) venue is proper in the Circuit Court of St. Louis County.

### **Statement of Facts**

The following paragraph describes developments that occurred in this litigation before Relator Schwarz Pharma, Inc. n/k/a UCB, Inc. (“Schwarz”) was served with any Petition or filing related to this matter. On February 22, 2012, Plaintiff Betty Bryan, a resident of Westmoreland County, Pennsylvania, along with 89 other plaintiffs, including an alleged resident of St. Louis City, filed a products liability action in St. Louis City against 27 defendants captioned *Jannett Anderson, et al., v. Wyeth LLC, et al.*, No. 1222-CC00910 (Circuit Court of St. Louis City) (the “*Anderson*” Petition). The *Anderson* plaintiffs sued Schwarz as well as Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., and Alaven Pharmaceutical LLC (together with Schwarz, the “Brand Defendants”). **A6-A63.** Plaintiffs did not serve Schwarz with the *Anderson* Petition. The defendants who were served filed a Motion to Drop Misjoined Plaintiffs Pursuant to Rules 52.06 and 52.05. **A64-A68.** The *Anderson* plaintiffs subsequently amended their Original Petition on two separate occasions. **A69-A183.** At that time, Plaintiffs did not serve Schwarz with either of these amended Petitions.

On August 8, 2012, the St. Louis City Circuit Court found it “manifestly apparent” that the *Anderson* plaintiffs were misjoined under Missouri law. Accordingly, the court: (1) severed the claims of the *Anderson* plaintiffs; and (2) ordered each plaintiff (or plaintiff-family) to file an individual petition. **A184-**



**A188.** These actions rendered the Second Amended *Anderson* Petition inoperative.

On October 2, 2012, 55 days **after** the circuit court had severed the 96-plaintiff *Anderson* Petition, and before filing an individual petition as required by the circuit court's order, Plaintiffs served the inoperative Second Amended *Anderson* Petition on Schwarz and filed a Memorandum Filing Return of Service.

**A189-A191.** This was the first time that Schwarz was served with any petition related to Ms. Bryan's claims. On October 3, 2012, Plaintiff Betty Bryan filed her Individual Petition in accordance with the severance order. Schwarz and the other Defendants were served with Plaintiff Bryan's Individual Petition on October 4, 2012. **A192-A230.**

On November 15, 2012—44 days after Schwarz was first served with any petition relating to this litigation and 42 days after Plaintiff Bryan filed her Individual Petition and served it on all Defendants—Schwarz, along with the other Brand Defendants, filed a Motion to Transfer for Improper Venue under RSMo. §§ 508.010 and 347.069(a) and Missouri Rule of Civil Procedure 51.045.<sup>1</sup> **A231-**

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<sup>1</sup> Schwarz and the other Brand Defendants also filed Motions to Transfer for Improper Venue to St. Louis County in the following related cases, which also are pending before this Court: *Fuller v. Wyeth LLC, et al.*, 1222 CC-10195; *Harker v. Wyeth LLC, et al.*, 1222-CC10204; *Howell v. Wyeth LLC, et al.*, 1222-CC10177;

**A236.** Within one week of that filing, all other defendants named in the *Bryan* Individual Petition joined in the motion to transfer. **A298-A311.**

On December 6, 2012, Plaintiff Bryan filed an opposition to Schwarz's Motion to Transfer for Improper Venue. She raised a single argument—that the August 8, 2012 Severance Order (rather than the filing of her Individual Petition on October 3, 2013) triggered the 60-day deadline under Rule 51.045, making the Motion to Transfer Venue untimely. **A312-A433.** Plaintiff did not address her failure to serve Schwarz with any petition in this matter until, at the very earliest, October 2, 2012. Schwarz and the other Defendants filed a reply to Plaintiff's opposition on December 21, 2012. **A434-A444.**

On January 10, 2013, Plaintiff Bryan called up for hearing Schwarz's and the other Brand Defendants' Motion to Transfer Venue. **A445-A448.** On January 25, 2013, Respondent, Judge David L. Dowd, heard oral argument on Motions to Transfer Venue in 12 cases pending in the City, including the *Bryan* case, that originally had been filed as part of the consolidated *Anderson* Petition. **A449.**

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*Krischke v. Wyeth LLC, et al.*, 1222-CC10168; *Mifsud v. Wyeth LLC, et al.*, 1222-CC10190; *Pullen v. Wyeth LLC, et al.*, 1222-CC10229; *Quayyum v. Wyeth LLC, et al.*, 1222-CC10226; *Simmons v. Wyeth LLC, et al.*, 1222-CC10223; *Stewart v. Wyeth LLC, et al.*, 1222-CC10215; *Wilcox v. Wyeth LLC, et al.*, 1222-CC10205. **A237-A288.**

Schwarz and the other Defendants argued at that hearing that the Motion to Transfer was timely because Schwarz was not even made a party to the *Anderson* case until October 2, 2012, at the earliest, when it was first served with the inoperative Second Amended *Anderson* Petition. Accordingly, Defendants argued, Rule 51.045 gave Schwarz until December 3, 2012 to file a Motion to Transfer. The Motion to Transfer that Schwarz filed on November 15, 2012, was thus timely.

On April 3, 2013, more than 135 days after Schwarz and the other Brand Defendants moved to transfer, the circuit court still had taken no action on the Motion to Transfer. Accordingly, Schwarz and the other Defendants submitted a Motion to Enforce Transfer Pursuant to RSMo. 508.010.10, which provides that, “[a]ll motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing.” **A450.**

Two days later, Respondent denied the Motion to Transfer and the Motion to Enforce Transfer on the lone ground that Schwarz’s Motion to Transfer was untimely. Respondent held that Defendants “were required to bring a motion to transfer venue within 60 days of service of process in the *Anderson* matter in order to preserve the issue of venue.” **A4.** The Court failed to address the fact that Schwarz was first served with the *Anderson* Petition in early October 2012. It made no mention of Schwarz’s particular position.

Although Respondent's Order Denying Transfer further stated that, "[i]t is well settled that the Court may transfer a case only upon a finding that venue is not proper in this court" (**A5**), Respondent did not address whether venue is proper in the City of St. Louis.

Schwarz and the other Defendants then filed a Petition for Writ of Prohibition, Suggestions in Support, and Exhibits with the Missouri Court of Appeals, Eastern District. **A451-A499**. Judge Clifford H. Ahrens, Presiding Judge of the Writ Division III, ordered Respondent to file suggestions in opposition to the Petition for Writ of Prohibition. **A500**. Counsel for Plaintiffs, on behalf of Respondent, filed Suggestions in Opposition to the Petition for Writ of Prohibition. **A501-A516**. On May 29, 2013, the Court of Appeals denied Schwarz's and the other Defendants' Petition for Writ of Prohibition in a split decision. Judge Gary M. Gaertner, Jr., Writ Division II, signed the order and Judge Lawrence E. Mooney concurred. Judge Clifford H. Ahrens dissented. **A517**.

This Petition for Writ of Prohibition followed. **A518-A569**. On August 13, 2013, this Court issued a Preliminary Writ of Prohibition. **A570**. The Preliminary Writ instructed Respondent to file a written return and show cause "why a writ of prohibition should not issue prohibiting [Respondent] from doing anything other than vacating [Respondent's] order of April 5, 2013, overruling Relator's Motion to Transfer for Improper Venue, in cause No. 1222-CC10178, entitled Betty Bryan,

Plaintiff v. Wyeth LLC, et al., Defendants.” **A570.** On September 12, 2013, Respondent filed a return to the Petition. **A571-A589.**

**POINTS RELIED ON**

**I. RELATOR IS ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR’S MOTION TO TRANSFER, BECAUSE THAT ORDER EXCEEDED RESPONDENT’S JURISDICTION AND AUTHORITY, IN THAT UNDER RULE 51.045(a) RELATOR HAD, AT MINIMUM, SIXTY DAYS FROM THE FIRST DATE OF SERVICE OF ANY PLEADING IN THIS MATTER TO MOVE TO TRANSFER AND RELATOR MOVED TO TRANSFER THIS CASE WELL WITHIN THAT PERIOD.**

*Sullinger v. Cooke Sales & Serv. Co.*, 646 S.W.2d 85 (Mo. banc 1983)

*State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. banc 1962)

*State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470 (Mo. 2002)

*State ex rel. Carver v. Whipple*, 608 S.W.2d 410 (Mo. banc 1980)

Missouri Rule of Civil Procedure 51.045

**II. RELATOR IS ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR’S MOTION TO TRANSFER, BECAUSE THAT ORDER EXCEEDED RESPONDENT’S JURISDICTION AND AUTHORITY, IN THAT UNDER RULE 51.045(a) RELATOR HAD**

**SIXTY DAYS FROM THE DATE OF SERVICE OF PLAINTIFF BRYAN'S INDIVIDUAL PETITION TO MOVE TO TRANSFER AND RELATOR MOVED TO TRANSFER THIS CASE WELL WITHIN THAT PERIOD.**

*Dube v. Wyeth LLC, et al.,*

4:12-cv-1912-ERW, 2013 WL 607834 (E.D. Mo. Feb. 19, 2013)

*Pa. Emps. Benefit Trust Fund v. AstraZeneca Pharms., L.P.,*

No. 08-cv-04787, 2008 WL 4891387 (E.D. Pa. Nov. 13, 2008)

Missouri Rule of Civil Procedure 51.045

**III. RELATOR IS ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR'S MOTION TO TRANSFER, BECAUSE THAT ORDER EXCEEDED RESPONDENT'S JURISDICTION AND AUTHORITY, IN THAT UNDER SECTION 508.010.5(1), R.S.MO., VENUE IN THIS TORT ACTION IS PROPER ONLY IN ST. LOUIS COUNTY, WHERE DEFENDANTS' REGISTERED AGENTS ARE LOCATED, GIVEN THAT PLAINTIFF'S FIRST INJURIES WERE LIKELY SUSTAINED IN PENNSYLVANIA, AND PLAINTIFF IS NOT A MISSOURI RESIDENT.**

*State ex rel. Green v. Neill*, 127 S.W.3d 677 (Mo. banc 2004)

*State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931 (Mo. 2008)

*Ex parte Haley*, 99 Mo. 150, 12 S.W. 667 (1889)

RSMo. § 508.010

RSMo. § 347.069



## **ARGUMENT**

**I. RELATOR IS ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR’S MOTION TO TRANSFER, BECAUSE THAT ORDER EXCEEDED RESPONDENT’S JURISDICTION AND AUTHORITY, IN THAT UNDER RULE 51.045(a) RELATOR HAD SIXTY DAYS FROM THE DATE OF SERVICE TO MOVE TO TRANSFER AND RELATOR MOVED TO TRANSFER THIS CASE WELL WITHIN THAT PERIOD.**

**A. Introduction**

Despite an undisputed record that Schwarz filed its transfer motion within 60 days of first being served with Plaintiff’s claims, the circuit court ruled that Schwarz failed to timely move for transfer. That was clear error and Relator is therefore entitled to a permanent writ of prohibition.

**B. Relator has Met the Standard For Issuance of a Permanent Writ of Prohibition**

A writ of prohibition is available “(1) to prevent an usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief

is not granted.” *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 17 (Mo. App. W.D. 2011). Additionally, “[p]rohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *Id.* A writ of prohibition should issue to prevent “an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent an abuse of extra-jurisdictional power.” *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 260 (Mo. banc 2002).

Under Missouri law, it is well-established that a writ of prohibition is an appropriate remedy to correct a trial court’s wrongful denial of a motion to transfer venue—the exact issue here. *See, e.g., State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 859 (Mo. banc 2001) (suggesting that “St. Louis city-county maneuvers” account for much of the case law on venue); *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28 (Mo. App. E.D. 2002). Here, the Writ of Prohibition should be made permanent because Respondent’s conclusion that Relator’s Motion to Transfer was untimely constitutes an abuse of judicial discretion. Further, a permanent writ is necessary to avoid irreparable harm to Relator and to prevent an abuse of extra-jurisdictional power.

**C. Respondent Erred by Ruling that Schwarz’s Motion to Transfer Was Not Timely Filed.**

Rule 51.045(a) states that “[a]ny motion to transfer venue alleging improper venue shall be filed within *60 days of service on the party seeking transfer.*” (emphasis added). Schwarz was first served with any petition, albeit an inoperative one, in which Ms. Bryan alleged claims against Schwarz on October 2, 2012, and was later served with Plaintiff Bryan’s Individual Petition on October 4, 2012. Schwarz’s Motion to Transfer was filed on November 15, 2012, which was 44 days after service of the inoperative consolidated petition and 42 days after service of Plaintiff Bryan’s Individual Petition.

Plaintiff never served Schwarz with either the February 22, 2012 Original Petition or the First Amended *Anderson* Petition. And Plaintiffs did not serve Schwarz with the Second Amended *Anderson* Petition, until October 2, 2012, when, by virtue of the severance order, it was no longer operative. **A189-A191.** Schwarz had (at least) until December 3, 2012, to file a motion to transfer to St. Louis County—60 days from the date on which Schwarz was first served. *See Sullinger v. Cooke Sales & Serv. Co.*, 646 S.W.2d 85, 88 (Mo. banc 1983) (venue cannot be waived until a party is before the court). Accordingly, while Relator does not concede that any Defendant waived venue, because Schwarz moved to transfer on November 15, 2012, the Motion to Transfer was timely as to Schwarz

and should have been granted. *See State ex rel. Bowden v. Jensen*, 359 S.W.2d 343, 345 (Mo. banc 1962) (“[A]ny waiver of improper venue by [another co-defendant] is not controlling or binding in any manner on defendant ...”) (overruled on other grounds).

Remarkably, during the January 25, 2013 oral argument on the Motion to Transfer, Plaintiff’s counsel **admitted** that if Schwarz was first served on October 2, 2012—which is undisputed—then the transfer motion was timely. Respondent’s conclusion to the contrary is unsupportable and an abuse of the court’s discretion.

Respondent has previously asserted that Defendants waived the argument that Schwarz timely moved to transfer because Defendants did not raise the issue in the briefing on the motion to transfer in the trial court. **A506, A557, A576.** Respondent’s argument ignores the transfer statute’s plain language. Rule 51.045 provides: “If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case.” Rule 51.045(a)(2); *see also State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 472 (Mo. 2002) (holding that upon the timely **filing** of a motion establishing that an action is filed in an improper venue, it is the obligation of the court to transfer the case to the proper venue.)

Here it is indisputable that Schwarz’s Motion to Transfer was timely filed. It was the filing of that Motion that preserved and asserted Schwarz’s venue challenge, and **no** other action was required or could constitute a waiver of

Schwarz’s venue challenge. The transfer statute plainly precludes Respondent’s waiver argument.

In any event, Schwarz has not waived its response to the Plaintiff’s assertion that the motion to transfer was untimely filed. At both the hearing on the Motion to Transfer and the hearing on the Motion to Enforce Transfer, Defendants specifically argued that the motion to transfer was timely because it was filed well within 60-days of Schwarz first being served with any petition in this case (or the broader *Anderson* litigation).<sup>2</sup>

The cases cited by Respondent—*Jones v. Church*, 252 S.W.2d 647 (Mo. App. 1952) and *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. banc 2011)—are inapposite. In *Jones*, the defendants “did not make **any** complaint of improper venue in the court below”. *Id.* at 648 (emphasis added). Likewise, in *Howard*, this Court declined to consider an issue (unrelated to venue) on appeal because defendant **never** raised that issue at the trial court level. *Howard*, 332 S.W.3d at 791 (“Because the City did not argue against the submissibility of future

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<sup>2</sup> Moreover, this Court has granted writs based on arguments that were not even raised in the writ briefs. *State ex rel. Carver v. Whipple*, 608 S.W.2d 410, 412 (Mo. banc Dec. 15, 1980) (making a preliminary writ permanent “for reasons not raised in the [writ] briefs but urged for the first time during oral argument”).

damages in its motion for directed verdict, it has failed to preserve the issue for appeal.”).

Respondent also cites *Robinson v. Field*, 342 Mo. 778 (1938) to argue that Defendants waived venue. However, in *Robinson*, both parties specifically requested that a certain circuit court hear their case. When one of the parties later challenged the venue of that circuit court, this Court held that “when both parties entered into a trial on the merits of all issues,” neither party should be allowed to argue that the court was without jurisdiction. *Id.* at 796. At no time did Schwarz agree that this case was properly venued in St. Louis City Circuit Court. To the contrary, Schwarz challenged venue at the first opportunity. *Robinson*, therefore, is inapplicable.

Respondent’s citation to *Norden v. Friedman*, 756 S.W.2d 158, 162 (Mo. 1988) likewise is unavailing. *Norden* merely holds that a statute of frauds defense is waived when not raised in the pleadings or at trial. *Id.* Here, Schwarz raised the issue of improper venue in its motion and accompanying briefs and argued the timeliness of the filing to the circuit court, which is evident from the record. The *Norden* decision has no application to the circumstances at issue here.

Respondent erred by ruling that Schwarz’s Motion to Transfer Venue was not timely filed. Thus, a permanent writ of prohibition is the appropriate remedy.

**II. RELATOR IS ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR'S MOTION TO TRANSFER, BECAUSE THAT ORDER EXCEEDED RESPONDENT'S JURISDICTION AND AUTHORITY, IN THAT UNDER RULE 51.045(a) RELATOR HAD SIXTY DAYS FROM THE DATE OF SERVICE OF PLAINTIFF BRYAN'S INDIVIDUAL PETITION TO MOVE TO TRANSFER AND RELATOR MOVED TO TRANSFER THIS CASE WELL WITHIN THAT PERIOD.**

**A. Introduction**

Despite the fact that there was no case to transfer prior to October 4, 2012—when Plaintiff served her Individual Petition—Plaintiff has argued that the Circuit Court's Severance Order triggered the 60-day transfer clock. Plaintiff's position is clearly incorrect because only service of the applicable pleading can trigger the time for filing a motion to transfer under Rule 51.045(a). Therefore, Schwarz's (and the other Defendants') November 15, 2012 Motion to Transfer was timely filed. Relator is therefore entitled to a permanent writ of prohibition.

**B. Relator has Met the Standard For Issuance of a Permanent Writ of Prohibition**

A writ of prohibition is available “(1) to prevent an usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.” *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 17 (Mo. App. W.D. 2011). Additionally, “[p]rohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *Id.* A writ of prohibition should issue to prevent “an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent an abuse of extra-jurisdictional power.” *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 260 (Mo. banc 2002).

Under Missouri law, it is well-established that a writ of prohibition is an appropriate remedy to correct a trial court’s wrongful denial of a motion to transfer venue—the exact issue here. *See, e.g., State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 859 (Mo. banc 2001) (suggesting that “St. Louis city-county maneuvers” account for much of the case law on venue); *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28 (Mo. App. E.D. 2002). Even ignoring the fact that Relator was not served with any petition related to this action (operative or inoperative) prior to October 2, 2012,



the Writ of Prohibition should be made permanent. Respondent's conclusion that Relator's Motion to Transfer was untimely constitutes an abuse of judicial discretion because Schwarz and the other Defendants moved to transfer within 60 days of the filing of the Bryan Individual Petition. Further, a permanent writ is necessary to avoid irreparable harm to Relator and to prevent an abuse of extra-jurisdictional power.

**C. Respondent Erred by Ruling that Relator's Motion to Transfer  
Was Not Timely Filed.**

Respondent ruled that Defendants' motion to transfer was untimely because it should have been filed within 60 days of service of the multi-plaintiff *Anderson* Petition. Respondent is wrong for the reasons stated above in Point I. In the briefing on behalf of Respondent before the Circuit Court, Appellate Court, and Supreme Court, Plaintiff has never supported this obviously incorrect rationale of the trial court. Instead, Plaintiff has argued, on Respondent's behalf, that the *Severance Order* triggered the time for filing a motion to transfer. But Respondent never adopted that position. In any event, Plaintiff's alternative rationale is likewise incorrect because only service of the complaint triggers the time for filing a motion to transfer and Plaintiff's Individual Petition was not served until October 4, 2012.<sup>3</sup>

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<sup>3</sup> In any event, Plaintiff never served Schwarz with the Severance Order.

The filing of Plaintiff's Individual Petition is the triggering date for the 60-day transfer clock because, prior to October 4, *there was no case to transfer*. See *Pa. Emps. Benefit Trust Fund v. AstraZeneca Pharms., L.P.*, No. 08-cv-04787, 2008 WL 4891387, at \*1 (E.D. Pa. Nov. 13, 2008) (concluding that the severance order did not begin the removal period because "[t]he case which is now before this Court did not exist as a separate, removable, case until the present new complaint was filed in compliance with the [severance order]"). The Severance Order was quite clear that the multi-plaintiff *Anderson* case could not continue on as currently plead. **A184-A188**. It required that each severed plaintiff—including Plaintiff Bryan—file a new, individual petition. **A187** ("The first-named Plaintiff in this action, Jannett Anderson, shall remain as the *sole* named plaintiff in this lawsuit, Cause No. 1222-CC00910.") (emphasis added). The Severance Order, in other words, placed the Plaintiffs in litigation limbo. Following the Order, the *Anderson* Petition was no longer valid and Betty Bryan had yet to create her own individual action by filing a new pleading. As such, there was no case for Relator or the other Defendants to transfer prior to October 4, 2012 and Relator's November 15, 2012 motion to transfer, which was joined by all other Defendants, was clearly timely. See Rule 51.045(a) ("Any motion to transfer venue alleging improper venue shall be filed within *60 days of service on the party seeking transfer*.") (emphasis added).

Related proceedings in federal district court also support that it is the filing of the Individual Petitions that triggered the time for filing a motion to transfer. *See Dube v. Wyeth LLC, et al.*, 4:12-cv-1912-ERW, 2013 WL 607834 (E.D. Mo. Feb. 19, 2013). After the multi-plaintiff *Anderson* Petition was severed and Individual Petitions filed, numerous petitions were removable. Relator and the other Defendants removed these petitions and all Plaintiffs moved for remand. In denying remand, District Judge Webber of the Eastern District of Missouri concluded that Defendants timely removed these petitions and found that, after the Severance Order was issued, “no individual files had been opened and assigned new case numbers, and only the Anderson plaintiff remained in the cause.” *Id.* **A598.** Therefore, Judge Webber held, “[t]he individual petitions were not filed until October 3, 2012, and, until the filing of these petitions, Defendants could not have removed the cases.” *Id.* The circuit court should have applied this same logic and held that, under Missouri’s transfer of venue statute, Relator and the other Defendants could not have moved to transfer the cases until the filing of the individual petitions.

Respondent erred by ruling that Relator’s Motion to Transfer Venue was not timely filed. Thus, a permanent writ of prohibition is the appropriate remedy.

**III. RELATOR IS ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER**

**DENYING RELATOR’S MOTION TO TRANSFER, BECAUSE THAT ORDER EXCEEDED RESPONDENT’S JURISDICTION AND AUTHORITY, IN THAT UNDER SECTION 508.010.5(1), R.S.MO., VENUE IN THIS TORT ACTION IS PROPER ONLY IN ST. LOUIS COUNTY, WHERE DEFENDANTS’ REGISTERED AGENTS ARE LOCATED, GIVEN THAT PLAINTIFF’S FIRST INJURIES WERE LIKELY SUSTAINED IN PENNSYLVANIA, AND PLAINTIFF IS NOT A MISSOURI RESIDENT.**

**A. Introduction**

There are no facts in the record upon which Respondent could find venue proper in St. Louis City and, indeed, the court did not so find. Plaintiff Bryan, a resident of Pennsylvania, alleged no facts to show that she was first injured in the City of St. Louis, as required by RSMo. § 347.069(2), or that she has any connection to Missouri. Instead, this case is properly venued in St. Louis County because Defendants’ registered agents are located there. *See* RSMo. § 508.010(5)(1).

Accordingly, a Writ of Prohibition must issue instructing the St. Louis City Circuit Court to transfer this case to St. Louis County Circuit Court.

**B. Relator has Met the Standard For Issuance of a Permanent Writ of Prohibition**

A writ of prohibition is available “(1) to prevent an usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.” *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 17 (Mo. App. W.D. 2011). Additionally, “[p]rohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *Id.* A writ of prohibition should issue to prevent “an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent an abuse of extra-jurisdictional power.” *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 260 (Mo. banc 2002).

Under Missouri law, it is well-established that a writ of prohibition is an appropriate remedy to correct a trial court’s wrongful denial of a motion to transfer venue—the exact issue here. *See, e.g., State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 859 (Mo. banc 2001); *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28 (Mo. App. E.D. 2002). Here the Writ of Prohibition should be made permanent because the Respondent’s failure to transfer a case that has no connection to St. Louis City, but has significant connection to St. Louis County, constitutes an abuse of judicial discretion. And a permanent writ is necessary to avoid irreparable harm to Relator and to prevent an abuse of extra-jurisdictional power.

**C. Respondent Erred by Failing to Transfer a Case with No Connection to St. Louis City to a Proper Jurisdiction.**

“A court that acts when venue is improper acts in excess of its jurisdiction.” *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004). St. Louis County is the proper venue for Plaintiff Bryan’s case based on two Missouri statutes. *See State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo. 2008) (noting that in Missouri venue is determined only by statute).<sup>4</sup>

Missouri’s general venue statute states that venue is proper where a plaintiff was first injured. *See* RSMo. § 508.010. Plaintiff Bryan is a resident of Pennsylvania, and she does not allege any injury in or connection to Missouri. The only reasonable inference is that her alleged injury first occurred outside of Missouri.

Section 508.010 states that when a plaintiff is first injured outside of Missouri, venue is proper only where a defendant corporation’s registered agent is located. *See* RSMo. § 508.010(5)(1) (“[I]n all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri ... If the defendant is a corporation, then venue shall be in any county

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<sup>4</sup> Approximately 13 cases, involving nearly identical allegations against many of the same Defendants named in this case, are already pending in St. Louis County, coordinated for pre-trial matters before the Honorable Richard C. Bresnahan.

where a defendant corporation's registered agent is located.""). This case is properly venued in St. Louis County because none of the Defendants has a registered agent in St. Louis City and Defendants have registered agents in St. Louis County.

Venue is also proper in St. Louis County pursuant to section 347.069(2), Missouri's venue statute relating to limited liability companies. *See* § 347.069(2), RSMo. ("Proceedings against a limited liability company shall be commenced either in the county where the cause of action accrued or in any county where such limited liability company shall have or usually keep an office or agent for the transaction of its usual and customary business, or in the county in which the office of the registered agent of the limited liability company is maintained."). Both Defendants Wyeth and Alaven are organized as LLCs. This cause of action did not accrue in the City of St. Louis and Wyeth and Alaven both have registered agents in St. Louis County. **A6-A63.** Thus, as under section 508.010, venue is proper in St. Louis County under section 347.069.

Respondent has suggested that this Court has already considered and rejected this argument because the Court declined to grant the application for writ of prohibition that was filed by the other Defendants in this case. **A581.** However, a court's decision not to issue a Preliminary Writ of Prohibition in no way equates to a ruling on the merits of the issues raised in the Petition for Preliminary Writ of

Prohibition. In fact, a review of the Court's Order makes it clear that the Court never addressed whether or not venue was proper in the City of St. Louis. **A1-A5.** Respondent's argument is therefore without merit.

**D. Given Relator's Timely Motion to Transfer, This Entire Matter Must Be Transferred**

In its Order Granting Preliminary Writ of Prohibition, this Court made it clear that Respondent was to show cause why "cause No. 1222-CC10178" should not be transferred. **A570.** The Order specifically, and on numerous occasions, refers to the entire cause of action and not individual claims or parties. **A570.** Therefore, should the Court make this Writ permanent, Respondent must take no further action other than to transfer the **entire cause of action** to the Circuit Court for St. Louis County.

Inexplicably, Respondent suggests that if this Writ is made permanent then Plaintiff's claims against Schwarz will be severed and transferred to St. Louis County Circuit Court while Plaintiff's claims against the other Defendants will remain in St. Louis City Circuit Court. **A581.** Respondent is simply wrong. The Missouri Rules provide that "[w]hen a transfer of venue is ordered, the *entire civil action shall be transferred* unless a separate trial has been ordered." Sup. Ct. R. 51.045(c) (emphasis added). Indeed, Missouri courts have long held that: "[t]he transfer of [a] cause by change of venue *[takes] with it the whole cause*, and every



incident belonging thereto ... just the same as if the cause had originated in that court.” *See Ex parte Haley*, 99 Mo. 150, 12 S.W. 667 (1889) (emphasis added). No separate trial has been ordered or requested in this case. Moreover, throughout this proceeding, there has been no suggestion that the claims in this case be severed. The Preliminary Writ of Prohibition on its face applies to the entire cause of action. Thus, should the Writ be made permanent, the entire cause of action must be transferred to St. Louis County Circuit Court.

### **Conclusion**

This Court should make permanent its Preliminary Writ, as the uncontested factual allegations show that Relator timely moved to transfer this case and venue is not proper in St. Louis City. Otherwise, Relator will be forced to engage in unnecessary and burdensome litigation and Respondent will be allowed to exert extra-jurisdictional power over this matter. This Court should order Respondent to take no further action in this case other than transfer this entire matter to St. Louis County Circuit Court.

Respectfully Submitted,

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**RELATOR SCHWARZ PHARMA, INC.'S CERTIFICATION**

Signature of this filing certifies the foregoing Brief complies with the limitations contained in Rule 84.06(b). This brief contains approximately 6,128 words.

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**CERTIFICATE OF SERVICE**

Signature of this filing certifies the foregoing Brief and Appendix were served this 15<sup>th</sup> day of October, 2013 as indicated below.

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